Supreme Court, U.S.
FILED

JUL 26 2001

OFFICE OF THE CLERK

No. 00-1815

In The
Supreme Court of the United States

STEAKHOUSE, INCORPORATED,
a Florida corporation;
INVESTMENT PARTNERS, INCORPORATED,
a Florida corporation,

Petitioners,

v.

THE CITY OF RALEIGH, NORTH CAROLINA,
a North Carolina municipal corporation;
RALEIGH BOARD OF ADJUSTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Thomas A. McCormick
City Attorney

Dorothy K. Woodward*
Associate City Attorney
CITY OF RALEIGH
Post Office Box 590
Raleigh, NC 27602
(919) 890-3060

Attorneys for Respondent City of Raleigh

John Silverstein
SATISKY & SILVERSTEIN
900 Ridgefield Drive
Suite 250
Raleigh, NC 27609
(919) 790-9102

Attorneys for Respondent Raleigh Board of Adjustment

**Counsel of Record*

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

I. Does North Carolina's certiorari procedure provide the possibility of prompt judicial review required by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 86 S. Ct. 942, 107 L. Ed. 2d 603 (1990) when the Raleigh Board of Adjustment denies a special use zoning permit for a topless dancing bar?

II. Does the First Amendment require the same degree of judicial alacrity in reviewing a denial of a permit for a topless bar as is required for reviewing a permit denial for a business selling sexually-oriented books, films, magazines, or similar materials?

III. Does Raleigh City Code §10-2144(b)(6) vest unbridled discretion in the Raleigh Board of Adjustment?

IV. "Whether a plaintiff bringing a facial challenge to the constitutionality of an ordinance requiring a special use permit for operation of a sexually oriented business must prove that the ordinance has been unconstitutionally applied."

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent corporations and no publicly held company owns stock in either Respondent.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Authorities v

Jurisdiction 1

Constitutional Provisions, Statutes, Ordinances, and Regulations 1

Statement of the Case 2

Reasons for Denying the Writ 7

I. Jurisdictional Defects Plague The Case 7

II. Petitioners Plan To Pander, Not To Speak, Thus The Petition Does Not Involve Issues Worthy Of Review By This Court 12

III. This Case Is Not The Appropriate Vehicle To Use To End the Prompt Access Versus Prompt Decision Debate 13

Contents—Continued

Page

IV. The Constitution Does Not Require Identical Treatment Of Topless Bars And Businesses Selling Written Materials On Judicial Review 16

V. Raleigh City Code § 10-2144(b)(6) Does Not Merit Supreme Court Review 16

VI. The Courts Below Ruled On Petitioners' Facial Challenge 19

Conclusion 20

Appendix A 1a

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Arizonans for Official English v. Arizona,
520 U.S. 43, 117 S. Ct. 1055,
137 L. Ed. 2d 170 (1997) 8, 9

Barnes v. Glen Theaters, Inc.,
501 U.S. 560, 111 S. Ct. 2456,
115 L. Ed. 2d 504 (1991) 14

Batch v. Town of Chapel Hill,
326 N.C. 1, 387 S.E.2d 655, *cert. denied*,
496 U.S. 931, 110 S. Ct. 2631,
110 L. Ed. 2d 651 (1990) 11

Browder v. Director, Dep't of Corrections,
434 U.S. 257, 98 S. Ct. 556,
54 L. Ed. 2d 521 (1978) 7

Central Hudson Gas & Electric Corp. v.
Public Service Comm'n,
447 U.S. 557, 100 S. Ct. 2343,
65 L. Ed. 2d 341 (1980) 15

City News and Novelty, Inc. v.
City of Waukesha,
531 U.S. 278, 121 S. Ct. 743,
148 L. Ed. 2d 757 (2001) 13

Cited Authorities--Continued

Page(s)

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) 8, 9

County of Lancaster v. Mecklenburg County, 334 N.C. 496, 434 S.E.2d 604 (1993) 10, 14, 18

Durham County v. Addison, 262 N.C. 280, 136 S.E.2d 600 (1964) 11

Fantasy World, Inc. v. Greensboro Board of Adjustment, 128 N.C. App. 703, 496 S.E.2d 825, *appeal dismissed and review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998) 11

Forsyth County v. York, 19 N.C. App. 361, 198 S.E.2d 770, *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973) 11

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) 10, 14

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) 12, 13, 14

Cited Authorities--Continued

Page(s)

Ginzburg v. United States,
383 U.S. 463, 86 S. Ct. 942,
16 L. Ed. 2d 31 (1966) 12

Godfrey v.
Union County Board of Adjustment,
317 N.C. 51, 344 S.E.2d 272, (1986)..... 11

Kovacs v. Cooper,
336 U.S. 77, 69 S.Ct. 448,
93 L. Ed. 515 (1949) 18

Lady J. v. City of Jacksonville,
176 F.3d 1358 (11th Cir. 1999), *cert. denied*,
529 U.S. 1053, 120 S. Ct. 1554,
146 L. Ed. 2d 459 (2000) 18

Metromedia, Inc. v. City of San Diego,
453 U.S. 490, 101 S. Ct. 2882,
69 L. Ed. 2d 800 (1981) 16

Needham v. White Laboratories, Inc.,
454 U.S. 927, 102 S. Ct. 427,
70 L. Ed. 2d 237 (1981) 7-8

Shuttlesworth v. City of Birmingham,
394 U.S. 147, 89 S. Ct. 935,
22 L. Ed. 2d 162 (1969) 18

Southeastern Promotions Ltd. v. Conrad,
420 U.S. 546, 95 S. Ct. 1239,
43 L. Ed. 2d 448 (1975) 15, 16

Cited Authorities--Continued

Page(s)

Steakhouse v. City of Raleigh,
166 F.3d 634 (4th Cir. 1999) 19

Village of Belle Terre v. Boraas,
416 U.S. 1, 94 S. Ct. 1536,
39 L. Ed. 2d 797 (1974) 12

Virginia Board of Pharmacy v.
Virginia Citizens Consumer Council, Inc.,
425 U.S. 748, 98 S. Ct. 1817,
48 L. Ed. 2d 346 (1976) 15

Ward v. Rock Against Racism,
491 U.S. 781, 109 S. Ct. 2746,
105 L. Ed. 2d 661 (1989) 18

Young v. American Mini Theatres, Inc.,
427 U.S. 50, 96 S. Ct. 2440,
40 L. Ed. 2d 310 (1976) 14

Statutes

N.C. Gen. Stat. § 160A-381 (1999) 3

N.C. Gen. Stat. § 160A-385.1 (1999) 7

N.C. Gen. Stat. § 160A-388 (1999) 1, 3

The Respondents, the City of Raleigh, North Carolina and the Raleigh Board of Adjustment, respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fourth Circuit's unpublished opinion filed February 5, 2001.

JURISDICTION

After the Court of Appeals resolved Petitioners' interlocutory appeal, the District Court granted summary judgment to Respondents. The summary judgment order was entered on March 17, 1999. (J.A. 3). Petitioners submitted no motion that would toll their time for filing a notice of appeal.

Friday, April 16, 1999 was the thirtieth day after entry of the order. Petitioners filed their notice of appeal with the District Court on Monday, April 19, 1999. (J.A. 3, 476-77). Respondents moved to dismiss the second appeal as untimely, but the Court of Appeals denied the motion.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

In addition to the excerpts provided by Petitioners, provisions from N.C. Gen. Stat. § 160A-388 (1999), Raleigh Board of Adjustment Rule V (2000), and Tenth Judicial District Local Rule 9.10 (2001) are also relevant to the Court's decision. These additional provisions are reproduced in Appendix A.

STATEMENT OF THE CASE

Steakhouse, Inc. and Investment Partners, Inc. are closely held Florida corporations owned by the same individuals. According to deposition testimony, Investment Partners wished to open a topless or nude dancing bar somewhere, but as of December 4, 1997, had not selected a city or State in which to operate. (Supp. A. 10-12, 34-35). In 1996, Steakhouse located and agreed to lease undeveloped land near the Raleigh-Durham International Airport. The land is within the City of Raleigh's zoning jurisdiction. Steakhouse intended to construct a building on the property that would house a "Rachel's World Class Men's Club"—a topless bar. (J.A. 222-23).

The City has had zoning ordinances in place since 1977 requiring special use permits for adult establishments. An adult cabaret, "any place which features topless dancers, go-go dancers, strippers, male or female impersonators, or similar entertainers," is one form of adult establishment. Raleigh, N.C. City Code § 10-2002 (2001). (J.A. 199). An applicant seeking a special use permit for an adult establishment must satisfy parking, advertising, concentration, and distance requirements. The applicant must also demonstrate that the proposed use will not adversely impact public services and facilities such as parking, traffic, or police, and must show that its secondary effects will not adversely impact on adjacent properties. The secondary effects at issue include noise, light, stormwater runoff, parking, pedestrian circulation, and safety. Raleigh, N.C. City Code § 10-2144(b) (2001). (J.A. 152).

The Raleigh Board of Adjustment issues special use permits. The Board is an independent, quasi-judicial body that operates under specific North Carolina statutory authority, N.C. Gen. Stat. § 160A-388 (1999). It is a separate entity from the City of Raleigh. The Board decides each permit application after a hearing that includes all aspects of a fair trial. If the Board decides to grant a permit, it may append conditions to that grant. Raleigh, N.C. City Code § 10-2141 (2001); N.C. Gen. Stat. § 160A-381 (1999). Judicial review of all Board decisions is by certiorari to the Superior Court. N.C. Gen. Stat. § 160A-388(e) (1999).

Steakhouse submitted a special use application to the Board on November 13, 1996, seeking a permit to operate a topless bar. (J.A. 201). Petitioners incorrectly describe the request to the Board. The application stated that Steakhouse wished to "[o]perate an adult cabaret, restaurant, lounge & private club with live entertainment." (J.A. 211). Steakhouse needed a special use permit only for the adult cabaret.

Raleigh's ordinances require all developers of vacant land to obtain City approval for their site plans. Site plan review involves the generic plan for a construction project and, in 1996, the Planning Department, Planning Commission, City Council, or a combination of these conducted the review. Steakhouse filed a site plan application on November 13, 1996 listing its intended use as a "restaurant and lounge." Contrary to Petitioners' assertions, the City Code clearly

included "adult establishment" as a category of use that accurately described Steakhouse's intended business.[1]

Steakhouse manipulated the timing of its special use hearing in an attempt to obtain site plan approval before its actual use was known. (J.A. 220). The Board meets once a month. Under its long-standing practices, the Board would have heard the application on December 9, 1996 had Steakhouse's counsel not requested a one-month delay. (J.A. 201).

The Planning Commission approved the proposed site plan on December 13, 1996 based on Steakhouse's representation that the business would be a restaurant and lounge. The City Council discovered what it perceived as attempted deception by Steakhouse and tabled the site plan pending the Board's decision on the special use. (J.A. 158).

The Board heard Steakhouse's special use application on January 13, 1997 and Board members voted to deny the permit. Steakhouse's claim that it was "forced" to waive evidentiary objections lacks support in the record. Steakhouse's counsel confidently and voluntarily waived hearsay objections and offered its own hearsay in rebuttal. (J.A. 261, 269, 271).

---

[1] The business was never intended to be a restaurant in the traditional sense of the word. As Steakhouse's vice president later testified, this "restaurant" would provide "10, 20, 50, maybe 60 dinners," (J.A. at 272), and then stated that the restaurant would provide 50 dinners "on a good night," (J.A. at 273), for patrons numbering up to 400. (J.A. 276).

The Board adopted its final written decision on March 10, 1997. The decision would have come a month earlier but Steakhouse's counsel told the Board's Sessions Reporter that there was no rush to complete the transcript. (J.A. 202). The Board found and concluded that Steakhouse intended to build a larger building than it had represented and, thus, did not meet the City Code's parking requirements. The Board also determined that Steakhouse had failed to show that its planned business operations would not cause parking, traffic, police, pedestrian circulation, safety, and stormwater runoff adverse impacts. (J.A. 275-80). Steakhouse did not petition the Superior Court for certiorari.

The City Code and the Board's rules contain the procedures that one must follow to obtain a special use permit. On appeal, Petitioners included the Board's filing instructions in the Joint Appendix. The instructions describe in painstaking detail what documents an applicant must include with his application. (J.A. 413). They also state that the applicant must stop by the City's zoning office and review the application with a zoning inspector before filing it. (*Id.*). No ordinance, rule, or regulation mandates this informal review. Individual citizens file the vast majority of the matters that come before the Board. Before the Board can consider an appeal, variance, or special use application, the applicant must fill in the blanks on the application form and include the documents listed on the form. (J.A. 407). Review exists to help inexperienced citizens complete the application form. Those familiar with the form, like Steakhouse's first lawyer, skip the review.

Zoning inspectors cannot reject applications; Petitioners are wrong on this point. The Board's Sessions Reporter accepts every completed application. Every completed application is heard by the Board, whether an inspector has reviewed it or not.

Before the hearing, the Sessions Reporter must notify all adjacent landowners of the permit request, place a sign on the property giving notice of the meeting, publish an advertisement for the meeting, and prepare materials for the Board's members. At the hearing, the Board takes evidence from those supporting or opposing an application. The Board deliberates publicly and votes on each application at the end of the hearing. After the hearing, the Sessions Reporter must transcribe the meeting, and the Board's attorney must prepare preliminary findings of fact and conclusions of law. Then the Board issues its final decision.

Prior to April 14, 1997, the Board had in place long-standing practices that produced prompt decisions. On April 14, 1997, the Board amended its rules to require service of a written decision no later than ninety days after an applicant submits his completed application. Ninety days is as short a time as is reasonable for the Board to accomplish the tasks necessary to produce a final written decision. (J.A. 202). At oral argument before the Court of Appeals, Petitioners dropped their challenge to the ninety-day limit.

If the Board denies a permit request, then an applicant cannot submit the same application for one year. The applicant can submit a different request at any time. After notice and a hearing,

the Board may set aside or modify a decision if the applicant committed fraud, misrepresentation, or other misconduct before the Board to obtain the permit, or if the permittee has violated a condition of the permit or other zoning law at the property. Raleigh, N.C. City Code § 10-2141(d) (2001). Once issued, a permittee obtains a vested right to use the permit. N.C. Gen. Stat. § 160A-385.1 (1999).

REASONS FOR DENYING THE WRIT

I. JURISDICTIONAL DEFECTS PLAGUE THE CASE.

Petitioners filed their notice of appeal too late. In a civil case, "the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1). This time limit is mandatory and jurisdictional. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264, 98 S. Ct. 556, 561, 54 L. Ed. 2d 521 (1978). Petitioners' notice of appeal had to be filed no later than Friday, April 16, 1999. They filed it on Monday, April 19, 1999. Petitioners did nothing to extend the thirty-day deadline, nor did they seek leave from the District Court to remedy the defect.

To reach the merits of this case the Court must create and apply an exception to the unambiguous terms of Fed. R. App. P. 4. Avoiding patchwork exceptions to the Rules of Appellate Procedure is an admirable goal best met by denying the writ. *Cf. Needham v. White*

Laboratories, Inc., 454 U.S. 927, 932, 102 S. Ct. 427, 429, 70 L. Ed. 2d 237 (1981) (Rehnquist, J., now C.J., dissenting).

Petitioners also lack standing. They assert only a facial challenge. In some circumstances, "one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756, 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988). Investment Partners is not "one subject to the law" and, thus, cannot bring a facial challenge. As of December 4, 1997, Investment Partners had not selected a city or State in which to operate the topless or nude dancing bar it contemplated possibly opening. (Supp. A. 10-12, 34-35). Investment Partners never located property in Raleigh to its liking. It made no attempt to open an adult establishment at any one of the other sites available in Raleigh for such a business.[2] Investment Partners never filed an application for a special use with the Raleigh Board of Adjustment.

Article III, §2 of the Constitution confines federal courts to deciding cases or controversies. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 1067, 137 L. Ed. 2d 170 (1997). An actual controversy must exist at all

---

[2] Petitioners' expert identified various sites within Raleigh's jurisdiction that could be used for an adult establishment. These sites were in addition to the 11 adult businesses already operating in Raleigh. Petitioners dismissed their challenge to the availability of reasonable alternative avenues of expression in the City "[u]pon consideration of the evidence developed subsequent to the initial pleading." (J.A. 254).

stages of review. *Id.* at 66, 117 S. Ct. at 1069. Investment Partners has no cognizable interest in Raleigh or in Raleigh's zoning laws. It presents to the Court a hypothetical question and seeks an advisory opinion, nothing more.

Steakhouse's petition presents a more interesting standing question, but one that yields the same result. Steakhouse erroneously relied below on *City of Lakewood v. Plain Dealer Publishing Co.* to authorize its facial challenge. In *Lakewood*, this Court allowed a facial challenge because the city's annual licensing requirement created a serious risk that newspapers would censor themselves to avoid antagonizing the city's mayor, who issued the permits allowing coin-operated newsracks on city property, and because the challenged ordinance applied narrowly and directly to conduct commonly associated with core speech: distributing newspapers. *Id.* at 758-60, 108 S. Ct. at 2144-45.

Facial challenges are the exception, not the rule. The general rule prohibiting facial challenges ought to apply to Steakhouse. Self-censorship is unlikely for a topless bar. These businesses produce huge profits. Estimates in the record pegged annual gross profits from a single bar at $3.4 to $4.4 million. (J.A. 40-41). So much money is at stake that protracted litigation of any adverse decision is almost certain.

Special use permits do not regulate speech. Permits do not regulate conduct commonly associated with core speech. The Board's decisions apply to land use, which is an area that federal courts have traditionally left to the States.

Conditions that the Board may append likewise relate to land use, not expression. A condition must be reasonably calculated to achieve a legitimate objective of the zoning ordinance and cannot be unnecessarily burdensome to the landowner. 3 A. Rathkopf, D. Rathkopf, & E. Zieglar, Rathkopf's The Law of Zoning and Planning, §40.04[1], p. 40-9 (1998). The Board cannot impose a condition so onerous that it nullifies the relief granted by issuing the special use. *Id.* at §40.04[4], p. 40-12.

An as applied review is an effective means of ensuring that the Board acts lawfully. Once an applicant shows that he meets the criteria set out in an ordinance, he is entitled to a permit as a matter of State law, unless competent, material, and substantial contrary evidence is introduced. *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 504, 434 S.E.2d 604, 612 (1993). When the Board denies a special use, it must provide factual findings explaining why the applicant did not meet the criteria. The Board's written decision gives a disappointed applicant specific reasoning that he can challenge in Court.

North Carolina's certiorari procedures are a quick and simple way of obtaining judicial review. They provide the type of review that *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), contemplates. In *Freedman*, the Court required prompt judicial review of the censor's decision, not the censorship law itself. In North Carolina, a Judge examines the record for errors of law, insures that the board has followed procedures set out in applicable statutes and ordinances, makes certain that the parties'

due process rights have been protected, insures that the board's decision is supported by competent, material, and substantial evidence, and insures that the board's decision is not arbitrary or capricious. *Fantasy World, Inc. v. Greensboro Board of Adjustment*, 128 N.C. App. 703, 496 S.E.2d 825, 827, *appeal dismissed and review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998). Certiorari exists to prevent an unconstitutional application of a zoning ordinance.[3]

---

[3] Ordinances are typically challenged through a declaratory judgment action or certiorari petition directed to the body that enacted the ordinance. North Carolina law is unclear on whether applicant can challenge the constitutionality of a ordinance on certiorari review of a decision on a special use, variance, or appeal of a zoning official's interpretation. Compare *Durham County v. Addison*, 262 N.C. 280, 283-84, 136 S.E.2d 600, 603 (1964) (validity of ordinance can be decided on certiorari) and *Fantasy World, Inc. v. Greensboro Board of Adjustment*, 128 N.C. App. 703, 496 S.E.2d 825, *appeal dismissed and review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998) (deciding First Amendment challenges to Greensboro ordinance on certiorari) with *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-62, *cert. denied*, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990) (ultra vires and takings claims should not be joined with certiorari review) and *Godfrey v. Union County Board of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986) (constitutional issue cannot be litigated on certiorari if not addressed by board). In the case cited by Petitioners, *Forsyth County v. York*, 19 N.C. App. 361, 363, 198 S.E.2d 770, 772, *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973), the State Court of Appeals noted that the applicant's failure to comply with permit requirements precluded a constitutional challenge. Petitioners read *York* too broadly.

II. PETITIONERS PLAN TO PANDER, NOT TO SPEAK, THUS THE PETITION DOES NOT INVOLVE ISSUES WORTHY OF REVIEW BY THIS COURT.

When asked under oath what type of conduct Petitioners intended to offer at their bar, their corporate representative explained that they wanted to offer dancing by female performers wearing as little clothing as North Carolina law allowed. When asked the purposes for providing these performances, the representative identified only one: money. (Supp. A. 39, 50-52).

Pandering—specializing in the business of presenting live human nudity—is not constitutionally protected conduct. *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966). *See also FW/PBS, Inc. V. City of Dallas*, 493 U.S. 215, 250, 110 S. Ct. 596, 617, 107 L. Ed. 2d 603 (1990)(Scalia, J. dissenting in part). Because their business is not protected by the First Amendment, Petitioners must prove that the City's ordinances lack a rational relationship to a permissible State objective and are beyond a range of reasonable alternatives. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797 (1974). Raleigh's ordinances are aimed directly at the well-known problems that topless dancing businesses produce and unquestionably survive rational basis scrutiny.

III. THIS CASE IS NOT THE APPROPRIATE VEHICLE TO USE TO END THE PROMPT ACCESS VERSUS PROMPT DECISION DEBATE.

An important and unsettled question remains after *FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990): what level of "prompt judicial review" is required of a permitting process involving sexually oriented businesses. Courts have split squarely and irreconcilably on this question. *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 121 S. Ct. 743, 746, 148 L. Ed. 2d 757 (2001). The issue is one of public importance that merits eventual resolution by this Court. Unfortunately, this is not the case to use to resolve it.

As noted above, jurisdictional defects will prevent the Court from reaching the merits here. Granting the writ will not end the debate.

A revision to the Tenth Judicial District's Local Rules moots the prompt judicial review issue for this case. In February 2001, the Tenth Judicial District adopted a rule granting expedited judicial review for an applicant who has been denied a special use permit for a sexually oriented business. Rule 9.10, effective May 1, 2001, grants a hearing to a disappointed applicant at the first available Court setting and no later than 45 days after he requests expedited review. The rule states that the reviewing Judge "should issue a decision from the bench or should otherwise assure that the applicant receives a

prompt judicial decision." (App. 4a). This rule ensures a prompt judicial decision on the merits. The City's special use procedure passes constitutional muster under even the most stringent view of *FW/PBS*.

The Court of Appeals could have reached the same result on the judicial review issue based solely on the Board's decision. Under North Carolina law, a board of adjustment decision is not an administrative determination. The Board makes a judicial decision. *County of Lancaster*, 334 N.C. at 508, 434 S.E.2d at 612. No further review was necessary to satisfy the requirements of *FW/PBS*.

A question exists whether the prior restraint doctrine ought to apply at all to permitting decisions for topless bars. Nearly nude dancing is, at best, "at the outer perimeter of the first amendment." *Barnes v. Glen Theaters, Inc.*, 501 U.S. 560, 566, 111 S. Ct. 2456, 2460, 115 L. Ed. 2d 504 (1991). Society's interest in allowing individuals to exhibit bare body parts to others does not implicate the same freedoms as does the right to engage in untrammeled political debate. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 40 L. Ed. 2d 310 (1976). Nor do live barroom topless performances implicate concerns that apply to books, photographs, or films. Printed materials have traditionally been afforded substantial First Amendment protection. Controlling decisions all involved adult fixed media. See *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965)(films); *FW/PBS*, *supra*, (arcades, bookstores, video stores, cabarets, theaters,

escorts; issue of differing standards for fixed and live performances not raised); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975)(theater performance with scripted action). Fixed media risks staleness from delay; topless barroom dancing does not. Live barroom performances present dangers that do not exist with fixed media. Nearly nude dancing can quickly degenerate into raw sexual misconduct. As the record shows, Raleigh has seen this degeneration first-hand. (Supp. A. 164).

The First Amendment jealously guards pure speech. Commercial speech is afforded somewhat less protection, despite that this speech serves an important informational function. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980). This Court has suggested that the usual restrictions on prior restraints do not apply to commercial speech. *Central Hudson*, 447 U.S. at 571 n.13, 100 S. Ct. at 2354 n.13; *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24, 98 S. Ct. 1817, 1839 n. 24, 48 L. Ed. 2d 346 (1976). For similar reasons, prior restraint analysis ought not apply to the permitting of topless bars.

Finally, the Court of Appeals was correct in its decision that the Board's rules and State certiorari procedures provide actual, prompt judicial review. No error exists in the decision below that cries out for the Court to remedy. This case is not worthy of Supreme Court review.

IV. THE CONSTITUTION DOES NOT REQUIRE IDENTICAL TREATMENT OF TOPLESS BARS AND BUSINESSES SELLING WRITTEN MATERIALS ON JUDICIAL REVIEW.

"Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889, 69 L. Ed. 2d 800, 811 (1981). "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions*, 420 U.S. at 557, 95 S. Ct. at 1247. The Court of Appeals followed this Court's precedent in determining that North Carolina's certiorari procedures provide prompt review of a Board decision involving a topless bar.

V. RALEIGH CITY CODE § 10-2144(b)(6) DOES NOT MERIT SUPREME COURT REVIEW.

Through the dispersion requirement in City Code § 10-2144(b)(3), Raleigh recognizes that locating adult businesses close to one another can blight an area. Raleigh also recognizes that certain uses are particularly incompatible with adult establishments. Section 10-2144(b)(4) separates adult businesses from those sensitive uses. Yet, these two Code provisions alone cannot solve all of the problems that a poorly

conceived topless bar will create. As an engineer testified, topless bars pose unique traffic problems and require more parking spaces for their patrons than a nightclub or restaurant that does not offer topless dancing. (J.A. 238-40). Insufficient parking can encourage errant patrons to engage in misconduct on adjoining properties as they travel to their cars. Noise and light may be a problem due to the particular topography of a potential site. A topless bar may strain police services if it opts to locate in an area that already taxes law enforcement and then does nothing to keep its property secure. Section 10-2144(b)(6) addresses the additional, site-specific problems that dispersion requirements miss.

Section 10-2144(b)(6) adequately cabins the Board's discretion. An applicant must provide evidence that its proposed use will not adversely impact public services and facilities such as parking, traffic, or police. The applicant must also provide evidence that the secondary effects of its use will not adversely impact on adjacent properties. Secondary effects include noise, light, stormwater runoff, parking, pedestrian circulation, and safety. These factors require the Board to focus on concrete topics and discrete impacts, not malleable concepts such as local welfare. The public services and public facilities involved are those taxed by a poorly run adult establishment. Relevant secondary effects are specified in the ordinance.

Once an applicant provides competent, material, and substantial evidence fulfilling subsection (b)(6), he is entitled to a permit as a matter of law, unless competent, material, and

substantial contrary evidence proves that a required condition has not been met. *County of Lancaster*, 334 N.C. at 504, 434 S.E.2d at 612. In this way, North Carolina law bridles the Board's discretion.

"[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 2755, 105 L. Ed. 2d 661 (1989). The regulation in force in Raleigh is more definite than other laws upheld in the face of similar challenges. An ordinance forbidding "loud and raucous" sound amplification was upheld in *Kovacs v. Cooper*, 336 U.S. 77, 79, 69 S.Ct. 448, 449, 93 L. Ed. 515 (1949). Unlike the ordinance at issue in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969), Raleigh's ordinance sets definite standards that focus on concrete topics. The evidentiary record that the Board must compile and the written findings and conclusions that it must enter prevent the Board from acting covertly.

In *Lady J. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1554, 146 L. Ed. 2d 459 (2000), the Eleventh Circuit found Jacksonville's special use ordinances too broad because the applicable criteria "empower[ed] the zoning board to covertly discriminate against adult entertainment establishments under the guise of general 'compatibility' or 'environmental' considerations." 176 F.3d at 1362. Raleigh's procedures and North Carolina law do not allow this result.

Subsection (b)(6) presents no issue of sweeping public importance. It will affect few, if any, other litigants. It is a unique subsection contained in the code of one municipality. The Circuits have not split on the language used in 10-2144(b)(6), nor does a conflict exist in State courts. This provision simply does not deserve Supreme Court review.

VI. THE COURTS BELOW RULED ON PETITIONERS' FACIAL CHALLENGE.

Petitioners' fourth question presented is not supported by the record or by the decisions below. Both the District Court and the Court of Appeals ruled on Petitioners' facial challenge. Neither Court required Petitioners to prove that ordinances had been applied in violation of the Constitution at any stage of the litigation. In deciding the first appeal, the Court of Appeals specifically noted that Steakhouse could challenge Raleigh's ordinances without first exhausting State law remedies. *Steakhouse v. City of Raleigh*, 166 F.3d 634, 642 n.5 (4th Cir. 1999).

CONCLUSION

No compelling reasons exist to grant the petition here. Compelling reasons exist to refuse it. Respondents ask the Court to deny the writ.

Respectfully submitted,

Dorothy K. Woodward
Associate City Attorney
Counsel of Record for the City
Thomas A. McCormick
City Attorney
City of Raleigh
Post Office Box 590
Raleigh, North Carolina 27602
(919) 980-3060
Attorneys for Respondent
City of Raleigh

John Silverstein
Satisky & Silverstein
900 Ridgefield Drive, Suite 250
Raleigh, North Carolina 27609
(919) 790-9102
Attorneys for Respondent
Raleigh Board of Adjustment

TABLE OF CONTENTS
Appendix to Brief in Opposition

Page

N.C. Gen. Stat. §160A-388(e) (1999) 1a

Raleigh Board of Adjustment's
Rules of Procedure, Rule V (2000) 2a

Tenth Judicial District Local Rules,
Local Rule 9.10 (2001) 4a

APPENDIX A-- CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

N.C. Gen. Stat. §160A-388(e) (1999):

(e) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

Raleigh Board of Adjustment's Rules of Procedure, Rule V (2000):

V. Appeals and Applications

A. Procedure for Filing Applications.

***

No application shall be considered by the Board unless a completed application is received at least 21 days prior to the next regularly scheduled meeting of the Board.

All applications for hearing shall be filed with the Sessions Reporter, who shall act as Secretary for the Board in receiving this notice. All applications shall be made upon the form furnished for that purpose, and all required information shall be provided thereon before an appeal or any application shall be considered as having been filed.

***

D. Decisions

1. Time. Decisions by the Board shall be made as soon as practicable after the hearing.

In considering an application for a special use permit for an adult establishment, unless an applicant or his representative consents to a longer period, the Board shall mail to or personally serve the applicant with the final decision of the Board as entered in the Board's minutes no later than ninety (90) days after the applicant files a completed application with the Sessions Reporter for the Board.

***

E. Special Rules for Appeal to Superior Court of a Board decision on an application for a Special Use Permit for an Adult Establishment (This section added April 14, 1997)

1. Unless good cause exists to contest a Petition for Certiorari, the Board shall stipulate to Certiorari in any appeal of a decision granting or denying a special use permit for an adult establishment no later than five (5) business days after the petitioner requests such a stipulation.

2. The Board shall transmit the Record to the court no later than five (5) business days after receiving the order allowing Certiorari.

3. Notwithstanding the provisions of any local rule of the reviewing court which allows for a longer time period, the Board shall file its brief within fifteen (15) days after it is served with the petitioners brief. If the petitioner serves his brief by mail, the board shall add three (3) days to this time limit, in accordance with G.S. 1A-1, Rule 5. If the local rule is subsequently amended to provide for a shorter time period for the filing of any brief, then the shorter time period shall control.

Tenth Judicial District Local Rules, Local Rule 9.10 (2001):

9.10 Special Provision for the Denial of a Special Use Permit for a Sexually Oriented Business. An applicant who has been denied a special use permit for a sexually oriented business by a municipality or county may request, in writing, expedited judicial review after filing a timely petition for certiorari. The applicant's brief required under Local Rule 9.2 shall accompany the request.

The matter shall be placed on the first available calendar after the applicant files the request and brief. The hearing will occur within 45 days after the applicant's filing. A judge reviewing the denial should issue a decision on the merits from the bench or should otherwise assure that the applicant receives a prompt judicial decision.

***

These rules shall become effective May 1, 2001. They have been promulgated and approved by the undersigned.

This the 20th day of February 2001.

/s/ Sallie B. Kearns,
Trial Court Administrator
/s/ Donald W. Stephens,
Senior Resident Superior Court Judge
/s/ Narley L. Cashwell,
Resident Superior Court Judge

/s/ Stafford G. Bullock,
Resident Superior Court Judge
/s/ Howard E. Manning,
Resident Superior Court Judge
/s/ Abraham Penn Jones,
Resident Superior Court Judge
/s/ Evelyn W. Hill,
Resident Superior Court Judge